Nos. 14-1468, 14-1470 & 14-1507

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

Additional Case Captions Listed Inside Front Cover

On Writs of Certiorari to the Supreme Court of Minnesota and the Supreme Court of North Dakota

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STEVE MICHAEL BEYLUND,
Petitioner,

v.

GRANT LEVI, DIRECTOR OF THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Civil Liberties Union respectfully submits this brief as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU regularly participates in cases before this Court involving threats to constitutional liberties, and was counsel of record in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013). *See also, e.g.*, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016); *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Riley* v. *California*, 134 S. Ct. 2473 (2014); *Maryland* v. *King*, 133 S. Ct. 1958 (2013). The ACLU is submitting this brief because these cases concern state statutes that make it a crime to assert a constitutional right, and thus threaten basic liberties under our Constitution.

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[1] No party or counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the brief's preparation or submission. No one other than *amicus curiae*, its members, or its counsel made any such monetary contribution. All parties have given their consent to this filing, in letters that have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

Drunk driving is a serious threat to public safety. But the disputed statutes in this case do not criminalize drunk driving. They criminalize the assertion of a constitutional right. And that is something the government cannot do.

Minnesota and North Dakota make it a crime to refuse a warrantless chemical test of a person's blood, breath, or urine to detect the presence of alcohol. Minn. Stat. §§ 169A.20(2), 169A.51(1); N.D. Cent. Code §§ 39-08-01(1)(e), 39-08-01(2)(a), 39-20-01(1). These chemical tests are searches under the Fourth Amendment, and declining to submit to a warrantless search that intrudes upon bodily integrity falls squarely within the ambit of that constitutional provision. An individual has a right to refuse to consent to such a search and insist that the police obtain a warrant. The government cannot criminalize that conduct.

The government cannot breach those constitutional limits indirectly through a licensing scheme, either. The States have broad powers to regulate conduct on the roads and impose significant consequences for drunk driving. They can suspend or revoke an individual's driver's license as a penalty for refusing a chemical test. These regulatory penalties rely on "implied consent" laws that presume a driver has agreed to take a chemical test if arrested on suspicion of drunk driving. But the very premise of these licensing conditions is *implied* consent, not actual consent voluntarily given by the individual—meaning that a motorist willing to face the attendant regulatory penalties can withdraw any such consent. A statute that threatens criminal penalties for

individuals who refuse to surrender a constitutional right exceeds the State's lawmaking powers.

ARGUMENT

I. THE GOVERNMENT CANNOT MAKE IT A CRIME TO ASSERT A CONSTITUTIONAL RIGHT.

A. Refusing To Consent To A Search Is An Assertion Of A Constitutional Right.

1. A Chemical Test Of An Individual's Blood, Breath, Or Urine Is A Search.

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons * * *, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U.S. 757, 767 (1966). Security in bodily integrity—literally, one's person—is at the core of this constitutional protection. *Id.* As this Court has long recognized, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891).

The chemical tests of a person's blood, breath, or urine covered by Minnesota's and North Dakota's statutes are searches under the Fourth Amendment. A blood test involves "a compelled physical intrusion

beneath [an individual's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1558 (2013). It is manifestly a search for constitutional purposes. *Id.*; *Schmerber*, 384 U.S. at 767. "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558 (quoting *Winston* v. *Lee*, 470 U.S. 753, 760 (1985)). Even though breath tests and urine tests do not involve the same skin-piercing intrusion as a blood test, the Court has made clear that these examinations of "biological samples" likewise "*must* be deemed Fourth Amendment searches." *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 618 (1989) (emphasis added); *see id.* at 616-617 (noting that a breathalyzer test "generally requires the production of alveolar or 'deep lung' breath," "implicates similar concerns about bodily integrity," and "should also be deemed a search"); *id.* at 617 (explaining that a urine test "can reveal a host of private medical facts," "intrudes upon expectations of privacy that society has long recognized as reasonable," and "must be deemed [a] search[]").

2. A Chemical Test Must Be Authorized By A Warrant Or Subject To An Exception.

This Court has emphasized that "the importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade another's body in search of evidence of guilt is indisputable and great.'" *McNeely*, 133 S. Ct. at 1558 (quoting *Schmerber*, 384 U.S. at 770). The Court's "classic statement of the policy underlying

the warrant requirement," *Coolidge* v. *New Hampshire*, 403 U.S. 443, 449 (1971), retains its full force today:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. *United States*, 333 U.S. 10, 13-14 (1948); *see McDonald* v. *United States*, 335 U.S. 451, 455 (1948) (stressing the "high function" served by a search warrant, and explaining that "the Fourth Amendment has interposed a magistrate between the citizen and the police * * * so that an objective mind might weigh the need to invade that privacy in order to enforce the law"); *see also Illinois* v. *Rodriguez*, 497 U.S. 177, 191 (1990) (same). In this way, the warrant requirement empowers individuals to test the propriety of a search—and to ensure that the search is lawful—by withholding consent and triggering the involvement of a neutral magistrate.

Because a test of a person's blood, breath, or urine is a search, this intrusion on bodily integrity is unreasonable unless it is either justified by a warrant or subject to an exception to the warrant requirement. *See McNeely*, 133 S. Ct. at 1569-70. Exceptions to the warrant requirement are " 'jealously and carefully drawn.' " *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*,

357 U.S. 493, 499 (1958)); *Katz* v. *United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (footnote omitted)).

One such exception to the warrant requirement may arise "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky* v. *King*, 563 U.S. 452, 460 (2011). But the metabolization of alcohol in the bloodstream "does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely*, 133 S. Ct. at 1568. This Court has specifically instructed officers conducting drunk-driving investigations that exigency depends on the totality of the circumstances. *Id.* at 1556; *see also id.* at 1561 ("The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation.").

Another exception to the warrant requirement attaches when a search is conducted as an incident to an arrest. But this Court has been at pains to emphasize that this exception should not swallow the general rule that the Fourth Amendment's warrant requirement persists "even when the search was conducted following a lawful arrest." *Id.* at 1558. Thus, the narrow search-incident-to-arrest exception attaches only where it is necessary to preserve evidence or promote officer safety. *See Arizona* v. *Gant*, 556 U.S. 332 (2009). Officer safety is, of course, not an issue when the search is for chemicals

contained in a suspect's blood, breath, or urine. *Cf. Riley* v. *California*, 134 S. Ct. 2473, 2485 (2014) ("Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or effectuate the arrestee's escape."). And the metabolization of alcohol in the bloodstream does not categorically justify an immediate, unconsented-to bodily intrusion without a warrant. *See McNeely*, 133 S. Ct. at 1559-60 (requiring exigent circumstances); *id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part) (same); *see also Riley*, 134 S. Ct. at 2494. Indeed, this Court has repeatedly confirmed that an arrestee does not relinquish his or her constitutionally protected privacy interests in bodily integrity. *McNeely*, 133 S. Ct. at 1565 (noting that the Court has "never retreated * * * from [its] recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests").

3. The Fourth Amendment Grants Individuals A Constitutional Right To Refuse A Warrantless Chemical Test.

Individuals have a constitutional right to refuse to consent to a warrantless search. *Camara* v. *Mun. Court*, 387 U.S. 523, 540 (1967). They may insist accordingly that the authorities obtain a warrant first. *Id.* In *Camara*, an individual refused to allow municipal authorities to enter his residence to conduct a warrantless health and safety inspection. *Id.* at 525-527. The Court concluded that this individual "had a constitutional right to insist that the inspectors obtain a warrant to search." *Id.* at 540. And the Fourth Amendment's warrant requirement applies to

persons with at least as much force as it does to property. *Schmerber*, 384 U.S. at 770 ("Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned."). The neutral magistrate plays an "essential role as a check on police discretion." *McNeely*, 133 S. Ct. at 1562-63. Without a warrant, no independent judicial arbiter has certified the search to be lawful and reasonable under the Fourth Amendment.

An individual wishing to exercise his Fourth Amendment right to refuse consent to a warrantless chemical test need only express that refusal clearly. Two petitioners did precisely that, and they did so in a peaceable manner. *See Birchfield* Pet. App. 2a; *Bernard* Pet. App. 3a. They "neither used nor threatened force of any kind." *District of Columbia* v. *Little*, 339 U.S. 1, 5 (1950). They did, however, effectively and unmistakably "protest[]" that the officers' intended search "would violate [their] constitutional rights." *Id.*

B. The Government May Not Impose Criminal Penalties Merely Because An Individual Has Claimed The Protection Of A Constitutional Right.

Minnesota and North Dakota make it a crime for an individual arrested on suspicion of driving while impaired to refuse a chemical test, even if the authorities have not obtained a warrant for that search. And the criminal penalties can be significant. Depending on the circumstances, test refusal can be a misdemeanor or a felony, and a conviction can result in incarceration ranging from days to years. *See*

Minn. Stat. §§ 169A.24-169A.276; N.D. Cent. Code § 39-08-01(3), (5).

The States have ample power to regulate driving-related conduct and enforce their drunk-driving laws. But the exercise of those powers cannot exceed constitutional limits. Most critically, a State may not subject individuals to criminal sanctions simply because they have asserted a constitutional right. *See Camara*, 387 U.S. at 540 (individual "may not constitutionally be convicted for refusing to consent to" warrantless search of his residence); *see also See* v. *City of Seattle*, 387 U.S. 541, 546 (1967) (individual "may not be prosecuted for exercising his constitutional right to insist" on warrant to search business premises).

This Court similarly has made clear that asserting this Fourth Amendment right cannot constitute the kind of active interference with law enforcement that independently constitutes a crime. In *Little*, the Court invalidated the conviction of an individual who had declined to consent to a warrantless inspection of her home. 339 U.S. at 6-7. She had refused to unlock the door for the authorities and claimed that the warrantless search would violate her constitutional rights. *Id.* at 5. Based on nothing more than this protest—a "mere refusal to unlock the door accompanied by remonstrances on substantial constitutional grounds"—she was convicted of interfering with an officer in the discharge of his duties. *Id.* at 5-6. This Court concluded that the refusal to consent to a warrantless search, coupled with "mere remonstrances or even criticisms of an officer," generally does not constitute criminal "interference" with a government official. *Id.* at 6. So too here: a verbal

refusal to accede to a search, without more, plainly does not rise to the level of criminal conduct.

Little was issued nearly seventy years ago; *Camara* and *See* were decided fifty years ago. The statutes at issue here thus are several decades behind the times, for they compel an individual to choose between the ability to assert a constitutional right and a criminal conviction. The "practical effect" of a system that requires such a choice "is to leave the occupant subject to the discretion of the official in the field." *Camara*, 387 U.S. at 532. That is the very discretion that this Court has "consistently circumscribed by a requirement that a disinterested party warrant the need to search." *Id.* at 532-533; *see also City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2451-54 (2015) (municipal code provision unconstitutional where it forced business owners to submit to a search, at risk of criminal penalties, without affording an opportunity for review before a neutral decisionmaker). The specter of criminal penalties, combined with the lack of independent review through the warrant process, "creates an intolerable risk" that officers will exceed the strictures of the Fourth Amendment. *Patel*, 135 S. Ct. at 2452-53.

It does not suffice under the Constitution that the (purportedly) criminal act of declining to consent to a chemical test occurs in conjunction with an arrest on suspicion of driving under the influence. This arrest does not void an arrestee's constitutional privileges; that is why a search incident to arrest is a narrow exception to the Fourth Amendment's general prohibition, not an invitation to a warrantless free-for-all. *See Riley*, 134 S. Ct. at 2489 ("Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a

narrow intrusion on privacy."); *Gant*, 556 U.S. at 351; *see also Chandler* v. *Miller*, 520 U.S. 305, 322 (1997) (" '[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.' ") (alterations in original) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). And in fact, under the statutes at issue in these cases, the State need not subsequently charge the individual with a separate drunk-driving offense at all. *See* Minn. Stat. § 169A.20(2) (making it a crime to "refuse to submit to a chemical test" for intoxication at the direction of an officer, full stop); N.D. Cent. Code § 39-08-01(1)(e) (making it a crime to "refuse[] to submit to * * * [a] chemical test" to determine alcohol concentration upon an officer's request, full stop). The petitioners here who were convicted under a test-refusal statute were, indeed, never charged with driving under the influence. *See Birchfield* Pet. Br. 5; *Bernard* Pet. Br. 7. Even if an individual is charged with a substantive drunk-driving offense but later acquitted, moreover, he or she may still be convicted and incarcerated under the test-refusal statute alone. *See State* v. *Kordonowy*, 867 N.W.2d 690, 692 (N.D. 2015) (upholding a jury verdict that found an individual "guilty of refusal to submit to chemical testing" but "not guilty of driving under the influence"), *petition for cert. docketed*, No. 15-989 (U.S. Feb. 3, 2016).

II. THE CHALLENGED CRIMINAL PENALTIES CANNOT BE JUSTIFIED AS A "CONDITION" OF OBTAINING A DRIVER'S LICENSE.

1. Drunk driving poses grave perils, and the government undoubtedly has an abiding interest in preventing it. *See Mich. Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990). And in fact, the States "have a broad range of legal tools to enforce their drunk-driving laws and to secure [blood alcohol concentration] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566. All fifty States and the District of Columbia have enacted implied-consent laws establishing that, by accepting a driver's license, a motorist has presumptively agreed to submit to a chemical test following an arrest for drunk driving. *Id.* States can and do impose an array of civil penalties if a driver revokes his or her consent and declines to submit to a chemical test; suspending a driver's license for one year as "a penalty for refusing to take a blood-alcohol test," for example, "is unquestionably legitimate, assuming appropriate procedural protections." *South Dakota* v. *Neville*, 459 U.S. 553, 560 (1983).

But those regulatory penalties are a far cry from criminalizing the assertion of one's Fourth Amendment right—with all of its attendant punitive and collateral consequences. *See, e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1, 8-9 (1998) (enumerating some potential collateral consequences of criminal convictions, including eligibility to vote, to serve on a jury, to serve in the military, to receive government benefits, and, for some noncitizens, to remain in the United

States at all). A State cannot bridge that constitutional gulf by asserting that motorists have irrevocably consented, before the fact, to a bodily search as a condition of obtaining their driver's licenses. Yet that is just what the respondent States have tried to do through the implied-consent laws linked to their criminal statutes. *See* Minn. Stat. § 169A.51(1), (2)(a)(2) ("Any person who drives, operates, or is in physical control of a motor vehicle within this state * * * consents * * * to a chemical test of that person's blood, breath, or urine," and "the person must be informed * * * that refusal to take a test is a crime * * * ."); N.D. Cent. Code § 39-20-01(1), (3)(a) ("Any individual who operates a motor vehicle * * * in this state is deemed to have given consent, and shall consent, * * * to a chemical test, or tests, of the blood, breath, or urine," and "[t]he law enforcement officer shall inform the individual * * * that refusal to take the test * * * is a crime * * * ."). And that is precisely what the States now appear to argue before this Court. *See Birchfield* Br. in Opp. 14 ("Birchfield * * * would first have to show he has a constitutional right to refuse the test even after he impliedly consented to it when he obtained his driver's license."). That premise is fundamentally mistaken. To satisfy the Fourth Amendment, consent to a search must be voluntarily given, not waived *ex ante* as a clandestine rider attached to receipt of a license. Indeed, the notion of blanket future consent is a peculiar concept—which is why this Court already has declined to countenance the idea.

As this Court recently explained, a decision to give or withhold consent to a search at one moment does not remain fixed for all time, or even for an indeterminate but arguably "reasonable" time. *See Fernan-*

dez v. *California*, 134 S. Ct. 1126, 1135-36 (2014). Consent to a search must ultimately be given willingly in each case, and whether a manifestation of consent was voluntary or coerced depends on the particular facts. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). A state statute cannot compel a person to consent to all future searches of a certain type—nor, equally, can a statute criminalize the act of revoking some prior consent.

The Fourth Amendment's "requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved." *Id.* at 229. By using criminal penalties to enforce a system of all-purpose "implied" consent, the respondent States have undone that constitutional bargain. Consent to a search, this Court has stressed, must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228. Nor may consent be "granted only in submission to a claim of lawful authority." *Id.* at 233. Subtle but nevertheless unjustified intrusions on a constitutional right are still constitutional violations. *Id.* at 228 (" 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' " (quoting *Boyd* v. *United States*, 116 U.S. 616, 635 (1886))). Here, the threat of ensuing criminal sanctions is hardly understated: officers are *required* to tell the individual that refusing the test is a crime. *See* Minn. Stat. § 169A.51(2)(a)(1)-(2); N.D. Cent. Code § 39-20-01(3)(a).

2. Licenses may come with certain conditions attached, to be sure. To acquire and maintain a li-

cense, a person must have proper qualifications and uphold a standard of behavior germane to the privilege the license affords. Lawyers must not lie to courts; doctors must not abuse their patients; motorists must not drive drunk. This Court has accordingly ruled that states may attach a condition to a license requiring consent to a requested search; if the motorist later withdraws consent, the consequence is revocation of the license. *See McNeely*, 133 S. Ct. at 1566. And that consequence can be significant. Driving is a vital part of daily life for many people in the United States. It often is required to maintain a job, to visit friends and family, and to obtain basic necessities—arguably all the more so in much of Minnesota and North Dakota. *See, e.g.*, Brian McKenzie, U.S. Census Bureau, *Who Drives to Work? Commuting by Automobile in the United States: 2013*, at 1 (2015).

But the States may not justify a criminal penalty as a licensing requirement. There is a difference between regulatory schemes and penal ones. *See, e.g.*, *Smith* v. *Doe*, 538 U.S. 84, 97-106 (2003) (applying the factors delineated in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), for demarcating criminal punishments). Under the unconstitutional conditions doctrine, which "prevent[s] the government from coercing people into" relinquishing their rights, even *regulatory* conditions attached to discretionary programs will not survive if they improperly coerce the waiver of constitutional rights. *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013); *see Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (condition on a benefit "impermissible" where it "would allow the government to 'produce a result which [it] could not com-

mand directly'" (alteration in original) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958))); *cf. Rumsfeld* v. *Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). While this Court has observed that such regulatory conditions are permissible with respect to blood-alcohol tests, *see McNeely*, 133 S. Ct. at 1566, on the spectrum of license conditions from permissible to coercive, it is simply not a close question that *criminalizing* one's failure to satisfy a license condition as the consequence of refusing a warrantless search is over the line. *See Koontz*, 133 S. Ct. at 2598 (forbidding governmental "pressure" to relinquish a constitutional right).

A State cannot evade the Fourth Amendment through statutory contrivances. And it cannot make a wholesale abandonment of a constitutional right a condition of holding a driver's license.

CONCLUSION

For the foregoing reasons, and those in petitioners' briefs, the judgments below should be reversed.

Respectfully submitted,

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